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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RONALD NATHANIEL HURTADO, Defendant and Appellant.	A122227 (Alameda County Super. Ct. No. H41196)

A jury convicted defendant Ronald Nathaniel Hurtado of three counts of attempted murder, shooting at an occupied motor vehicle, and attempting to dissuade a witness, and found true various gang and gun use enhancements. The trial court sentenced defendant to a term of 15 years to life for shooting at an occupied vehicle, consecutive terms of seven years to life for attempted dissuasion of witness and 37 years for one of the three attempted murder counts, and concurrent sentences of 37 years each for the remaining attempted murder counts.

Defendant contends the trial court prejudicially erred by failing to (1) uphold his challenge for cause of one of the jurors, (2) stay imposition of sentence on all three of the attempted murder charges under section 654, and (3) grant him the full amount of presentence custody and conduct credits to which he was entitled. We agree in part with defendant's contentions and will modify the judgment to stay imposition of a concurrent sentence on one of the attempted murder convictions, and correct defendant's presentence credits. In all other respects, we affirm the judgment.

I. BACKGROUND

Defendant was charged by amended information with three counts of attempted murder (Pen. Code,[1] §§ 187, subd. (a), 664; counts 1, 2, and 3), shooting at an occupied motor vehicle (§ 246; count 4), and attempting to dissuade a witness (§ 136.1, subd. (a)(2); count 5). The information alleged that defendant committed each of the five offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). The information also alleged in counts 1 through 3 that defendant personally discharged a firearm (§ 12022.53, subd. (c)), and in count 4 that he personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)).

Defendant denied the charges and allegations, and a jury trial commenced on April 14, 2008.

A. *Prosecution Case*

On December 2, 2005, Arlen Padilla drove his sister and his mother Maria in his van to an apartment where his sister's friend lived. Padilla parked in the driveway outside the apartment, and he and Maria stayed outside while his sister went in to visit her friend. Fifteen minutes later, as Padilla, his mother, and his sister were driving away down the driveway, a male, later identified as defendant, stared at them, and then Padilla saw defendant aiming a gun at him, and heard seven to nine gunshots. Padilla's sister was sitting in the front passenger seat and Maria was sitting in the middle of the back seat. Padilla accelerated, but a bullet hit his gas tank, his electricity failed, and the van came to a stop. The shooter, who was wearing a beret, a black jacket, black pants, and a black T-shirt, then jumped into the passenger side of a Ford Expedition, which sped off.

Padilla and his sister both recognized defendant before he started shooting. Approximately one year earlier, defendant and another man followed Padilla and his brother into a bathroom at the Southland Mall, blocked the door, and asked Padilla whether he was a Northside Hayward gang member or was a Sureño. Padilla was not in a gang and had never been in a gang. In a second encounter, defendant approached Padilla

[1] All further statutory references are to the Penal Code.

outside of his apartment and asked him if he belonged to a gang and mentioned "Northside Hayward." Padilla ran upstairs and locked the door of his apartment. Padilla also would see defendant hanging out with friends at the corner liquor store in the neighborhood. Padilla positively identified defendant as the shooter in a photographic lineup.

Padilla's sister had seen defendant before passing by her apartment with his friends. She had seen him make gang hand gestures and knew his nickname was "Speedy." After the shooting, she identified him from a photographic lineup.

None of the van passengers were injured. The van had bullet holes in the gas tank, driver's side door, the hatchback, and both driver's side tires. There were also three bullet holes in a truck parked across the street and one in a fence across the street. The police found eight shell casings at the end of the driveway, from Smith & Wesson .40-caliber rounds. The handgun used was a semi-automatic that feeds a new round into the chamber every time a round is fired.

The day after his arrest, defendant made a telephone call from jail to a relative named "Melissa." In the call, which was recorded and played for the jury, defendant said: "Look, there's a number in there, right? It's under Shawn. Call him up, tell him I'm in jail, and tell him that I need him to do me a big favor, and to make sure dude don't come to court—his family don't come to court. They live right there in, uh, in apartments right there, so I need you to start letting people know to make sure they don't come to court."

Testimony regarding a series of police contacts with defendant from 2002 through 2005, established that defendant was a member of Northside Hayward Gang (NHG), affiliated with the Norteños. Colby Staysa, a sergeant with the Alameda County Sheriff's Department and gang expert, testified about the history of the NHG, and the characteristic behaviors and criminal activities engaged in by gang members. He opined that NHG members engage in a pattern of criminal activity and testified to specific criminal acts committed by known gang members. Based on his review of police documents, interviews with Hayward police officers, and conversations with the sheriff's

office's lead investigator assigned to the shooting, Staysa further opined that defendant was a member of NHG[2] and that the shooting was committed for the benefit of NHG in order to promote its violent reputation. In Staysa's opinion, defendant's jail telephone request to "Melissa" was also done to promote the gang's reputation and to assist the gang.

B. *Defense Case*

Rashawn "Shawn" Mitchell, who had known defendant for about two years, witnessed the shooting from the porch of his home. Mitchell saw a man wearing a black hoodie get out of the passenger side of a small car and walk toward the back of the apartment building. Within about 15 seconds, a van drove down the driveway toward the street and Mitchell heard several shots; he saw the man in the hoodie walk down the driveway, and get back in the car which drove away. Mitchell did not recognize the man in the hoodie but knew he was not defendant.

While Padilla testified the shooter held the gun in his right hand, defendant's mother testified that defendant is left-handed and cannot fully bend his right index finger due to an injury suffered several years earlier.

C. *Verdict, Sentencing, and Appeal*

The jury convicted defendant on all counts and found all of the special allegations true. The court imposed a term of 15 years to life for the underlying offense and enhancement allegations in count 4 (shooting at an occupied vehicle), a consecutive seven-years-to-life sentence for the underlying offense and enhancement allegations in count 5 (attempted dissuasion of witness), a consecutive sentence of 37 years for the underlying offense and enhancement allegations in count 1 (attempted murder),[3] and

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[2] Staysa based his opinion about defendant's membership on the totality of the circumstances including defendant's admitted membership in the gang, the location of the police contacts with him, his clothing, tatoos, and hairstyle, and his associations with other gang members.

[3] The 37-year determinate sentence was comprised of the midterm of seven years for attempted murder, plus 10 years for the gang enhancement and another 20 years for the firearm discharge enhancement.

concurrent sentences of 37 years each for the underlying offenses and enhancement allegations in counts 2 and 3 (attempted murder). Defendant was given credit against his sentence for 950 days of actual time in custody, with no presentence conduct credits.

This timely appeal followed.

II. DISCUSSION

Defendant contends the trial court prejudicially erred by failing to (1) uphold his challenge for cause of Juror No. 10, (2) stay imposition of sentence on the attempted murder charges under section 654, and (3) properly determine his presentence custody and conduct credits.

A. *Juror Challenge*

1. *Facts*

Juror No. 10 lived in Alameda, had never served on a jury, and had never been the victim of a crime. Juror No. 10 was asked by the court whether she could "think of any reason" why she could not be completely fair and impartial, and she replied, "I guess not. No." The court turned to defense counsel for voir dire. Defense counsel asked Juror No. 10 why she paused when answering the court's question about fairness and impartiality. She replied: "I just—I don't know what the hesitation was. I just thought, why wouldn't I be? I can be as fair and impartial as anyone else." Later in defense counsel's voir dire of this juror, the following exchange occurred:

"[Defense Counsel]: In reading the Information, when you first heard it, did you have any feelings like it's more likely than not Mr. Hurtado's guilty just because he's sitting here?

"A: Probably.

"Q: You heard the judge instruct us that there's a presumption of innocence. Do you recall that?

"A: Um-hum.

"Q: And would you follow that instruction of presumption of innocence?

"A: I don't know. I think I've probably already in my mind decided.

"Q: Already you've decided?

"A: Um-hum.

"Q: What's your decision, Madam Juror?

"A: I just think if he's made it this far, it wasn't for doing nothing.

"Q: Did you base your decision on the reading of the information?

"A: Yes. [¶] . . . [¶]

"Q. So, in summary, how do you stand right now: Guilty or not guilty?

"A. I would lean towards guilty."

When he conducted his voir dire of Juror No. 10, the prosecutor reiterated that one of the rules was the presumption of innocence. After the prosecutor asked Juror 10 whether she could follow the presumption of innocence rule "even though you may have a general feeling or attitude about what has or hasn't occurred," the following exchange took place:

"[Juror No. 10]: I don't know. I mean, I don't know. I have already kind of come up with an idea as I think the process has already made it to this point. I don't see how it could be that much innocence. So maybe I can't follow those rules."

"Q: I don't want to go through a lot of general topics with you if in all honesty that's where your attitude is, that you feel like, I can't necessarily apply that, I can't promise you I'm going to be fair and impartial and apply that rule. [¶] Is that where you are? You can't make that promise? [¶] . . .

"A: I guess not, yeah. I can't."

The court then addressed extended comments to Juror No. 10 about the duties of a trial juror. The court acknowledged that "[i]n the real world, I think we all hope that police officers are not going out randomly selecting citizens off the street to randomly put charges on them," so that there would always be some reason a defendant was on trial. The court explained that a juror is told to "put that aside" and to not take the filing of a criminal charge as "evidence that the charge is true." The court told Juror No. 10 that she must "not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial." Rather, the job of the juror is to apply a much higher standard than the standard for making an arrest and that "[t]he fact that it made it over

those other hurdles [for making an arrest] means nothing in terms of whether it makes it past the hurdle of proof beyond a reasonable doubt." At one point, the court asked Juror No. 10 whether she "[saw] what we are trying to do here." The juror replied, "I see what you're trying to do. I guess I don't know that I agree."

The court asked the juror whether her not agreeing meant that the standard for an arrest—probable cause—was enough for her to convict. She responded: "No. I don't think that's enough to convict. I know I have to listen to all the evidence, of course." The court explained that most jurors who have not served on a jury before do not really understand what jurors are asked to do and the process they go through, until they go through the process themselves, but that the system would not work if people "won't follow the law that you have to put aside that [the defendant was] arrested and charged, and weigh the evidence as if none of that had occurred." The court and Juror No. 10 then had the following exchange:

"[The court]: [¶] . . . [¶] So it really comes down to the instruction is fairly straightforward. The fact that there is an arrest is not evidence. The fact that a charge has been brought is not evidence. You cannot base a decision based on those things. You have to base the decision on the evidence that actually gets presented. [¶] . . . [¶] Are you able to do that?

"A: Well, if you put it that way, yeah. I mean, if I just have to listen to the evidence and decide, I mean, I could hear a lot of evidence and decide based on that. I'm just initially—just told you what I felt about it.

"Q: Sure. And like I say—

"A: I could change my mind."

Later, Juror No. 10 stated, "I think I would be able to do it. I just don't honestly know of it's something I want to do." The court followed up with a further statement and question: "To be blunt, you've been drafted. If I had to get 12 people that wanted to come in and do jury duty, this would become a very lonely place. But it's like I say, there is no such thing as a right that does not have a cost involved with it. . . . [¶] So do you think you can go ahead and put aside any assumptions you may have concerning the

arrest or the charging of the defendant and go strictly on the law and the evidence that gets presented here?" Juror No 10 replied: "Yeah, I guess."

The prosecutor resumed questioning Juror No. 10 and, after addressing various general matters, returned to the issue of standard of proof:

"[Prosecutor]: First of all, that promise includes the promise to apply the presumption of innocence. Are you okay with making that promise to do that?

"A.: Yeah. Yes. If that's what I'm instructed to do, I guess yes, I would. [¶] . . . [¶]

"Q.: . . . [¶] With the judge's explanation of what the presumption of innocence means and how it applies, are you comfortable saying yes, I will presume him to be innocent, I will reserve judgment until I've heard all the evidence, and if I am satisfied of guilt beyond a reasonable doubt, I'll vote guilty, and if I'm not, I'll vote not guilty? Can you promise to do that?

"A: I don't know if—because I already said that I thought he might be guilty—if I could say yes, I would presume him innocent. That's contradictory.

"Q.: No. Because lots of jurors come in here and their initial reaction is, hey, if I can honestly tell you, they can say I think he might be. It's okay. That's a human feeling; that's honest emotion. [¶] [O]ur rule is that . . . . [u]ntil you've heard all the evidence, you have to presume he's not guilty. We ask you to follow that rule even though you may have had an initial reaction. Everyone has initial reactions to people. [¶] Can you do that?

"A: Yeah."

The court then asked one final question:

"Q: And I frequently tell folks, I've been doing this for a long time, I've seen probably a few hundred trials over the years, and, to be real blunt, I really couldn't care less who wins and who loses in a trial, but what I do care about is that both sides get a fair trial. [¶] Are you in a position where you can say that you can give both sides a fair trial?

"JUROR NO. 10: I think I can be fair."

Defense counsel declined further questioning and challenged Juror No. 10 for cause. He had exhausted all of his peremptory challenges before Juror No. 10 was questioned. The court denied the challenge as follows: "What happens is this is a different process. This is, like I say, different from the television, the newspapers. And very frequently people come in and it's all very foreign, and so thinking about some of these things is a very different process. To a certain extent we ask people to readjust and to think about it. That's part of the reason why I read that reasonable doubt instruction at the very beginning, because people are frequently confused and think that it involves proof beyond all possible doubt. And it does not. [¶] And it seems to me that that's what we're talking about, that you have indicated clearly that you can give both sides a fair trial here now that you understand better what it's all about. [¶] So the challenge for cause would be denied."

2. *Applicable Law*

A juror may be challenged for cause for, among other things, exhibiting actual bias, which "may consist of an opinion as to the guilt or innocence of the accused . . . or . . . a preconceived opinion concerning the defendant . . . which would prevent a fair consideration by the juror of the evidence given or facts proven in the case." (*People v. Riggins* (1910) 159 Cal. 113, 117.)

"A trial court should sustain a challenge for cause when a juror's views would 'prevent or substantially impair' the performance of the juror's duties in accordance with the court's instructions and the juror's oath. [Citations.] On appeal, we will uphold a trial court's ruling on a challenge for cause by either party 'if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.' [Citations.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 981–982.)

3. *Analysis*

As an initial matter, we reject the People's claim that defendant forfeited any error in the denial of his challenge to Juror No. 10 because he failed to communicate his dissatisfaction with the jury ultimately selected. The forfeiture cases cited by the People

are factually distinguishable. In these cases, the defense ultimately used peremptory challenges to excuse all of the jurors it had unsuccessfully challenged for cause. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 891–892; *People v. Weaver* (2001) 26 Cal.4th 876, 911.) An objection to the jury as finally constituted is necessary to preserve the issue on appeal in such cases because "it is possible that, despite [defense] counsel's initial misgivings about the composition of the jury, he ultimately was satisfied with the jury as sworn, and, had he expressed dissatisfaction, the trial court may have allowed him to exercise additional peremptory challenges." (*People v. Hamilton*, at p. 892.) Here, nothing changed after defendant's unsuccessful challenge to Juror No. 10 that would have placed in doubt whether he was satisfied with the jury as sworn, or allowed the court to consider granting him another peremptory challenge. Under these circumstances, defendant was not required to proclaim his dissatisfaction with Juror No. 10 a second time in order to preserve the issue for appellate review.

On the merits, we find no abuse of discretion in the trial court's denial of defendant's motion to excuse Juror No. 10. The juror simply vocalized feelings that many jurors must have when hearing the charges against a defendant read and seeing the defendant sitting in the courtroom—that something must have happened to bring him to that point. Juror No. 10 was obviously inexperienced about the process and had no knowledge of what was expected of her as a juror, but she was not unique in bringing preconceptions about the legal process into the case. Recognizing that, the court patiently and eloquently explained to Juror No. 10 why she needed to set her preconceptions aside and what she would need to do in order to be a fair juror. Based on our review of the court's exchanges with Juror No. 10, it is apparent that the court believed the proverbial light bulb came on in this juror's head and that, despite her conflicting statements, her true state of mind in the end—when she stated, "I think I can be fair"— was consistent with the performance of her oath and duties as a juror. If a challenged juror's responses to voir dire questions are conflicting or equivocal, the trial court's determination of the juror's true state of mind is binding upon the reviewing court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1319.)

The trial court's ruling on defendant's challenge for cause of Juror No. 10 is supported by the record and must be upheld.

B. *Sentencing*

Defendant maintains that this court should stay the three 37-year terms—one consecutive and two concurrent to his sentences on counts 4 and 5— that he received for attempted murder. He argues that, under section 654,[4] when one person is the victim of two offenses resulting from the same indivisible act the court can impose an unstayed sentence for one or the other offense, but not for both. According to defendant, Arlen Padilla, his sister, and Maria Padilla were each the victims of two offenses—attempted murder and shooting at an occupied vehicle—that arose from the same act of shooting. From that premise, he concludes that the sentences imposed for the attempted murder of each victim must be stayed.

Section 654 prohibits the imposition of punishment for more than one violation arising out of an act or omission which is made punishable in different ways by different statutory provisions. (*People v. Masters* (1987) 195 Cal.App.3d 1124, 1127 (*Masters*).) This prohibition applies not only where there is literally a single act but "also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) However, the proscription against multiple punishment does not apply to violations arising from an indivisible course of conduct *if during the course of that conduct the defendant committed crimes of violence against different victims.* (*People v. Miller* (1977) 18 Cal.3d 873, 885.) The rationale for the multiple victim exception was explained as follows in *Neal v. State of California* (1960) 55 Cal.2d 11 at page 20: "The purpose of the protection against multiple punishment is to insure that the defendant's punishment

[4] Section 654, subdivision (a) provides in relevant part as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person."

A corollary rule is that as long as each violent crime committed during an indivisible course of conduct involves *at least one* different victim, section 654's prohibition against multiple punishment is not applicable. (*People v. Miller*, *supra*, 18 Cal.3d at p. 886, fn. 11.) Thus, in *Masters*, this court held that a defendant who fired on a vehicle occupied by three persons, injuring one, could be sentenced consecutively for assault with a deadly weapon on the injured victim and discharging a firearm into an occupied vehicle, since each of the two crimes involved at least one different victim. (*Masters*, *supra*, 195 Cal.App.3d at pp. 1126, 1130.)

Defendant relies principally on *People v. Garcia* (1995) 32 Cal.App.4th 1756 (*Garcia*). The defendant in *Garcia* held a gun on the occupants of a vehicle and fired at the vehicle in the course of a robbery. (*Id.* at pp. 1762–1763.) He was convicted of, among other things, four counts of assault with a firearm and shooting at an occupied motor vehicle, and sentenced to (1) consecutive terms for shooting at an occupied vehicle (count 5) and for one of the assault counts (count 6, involving victim Verdin); and (2) unstayed concurrent terms on each of the three other assault counts (one for each of the three other occupants). (*Id.* at p. 1764.) On appeal, the defendant contended that imposing unstayed sentences on both counts 5 and 6 violated section 654. (*Garcia*, at p. 1780.)

The Court of Appeal in *Garcia* rejected the defendant's argument: "The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent. Where one person is the victim of both a shooting at an occupied motor vehicle and a simultaneous assault, the trial court can impose an unstayed sentence for one or the other, but not for both. [Citations.] We believe this is equally true where the same persons are the victims of a shooting at an occupied motor vehicle and of simultaneous assaults: the trial court can impose an unstayed sentence for the shooting, based on any given victim, or for the

assault on that victim, but not for both. [¶] . . . [¶] . . . [D]efendant was properly punished both for the crime of shooting at an occupied motor vehicle, the victims of which were Verdin and three others, and for the assault on Verdin, because each crime involved at least one different victim." (*Garcia, supra*, 32 Cal.App.4th at pp. 1784–1785, italics omitted.)

Under *Masters* and *Garcia*, the trial court here could properly impose unstayed sentences on defendant for (1) shooting at an occupied vehicle and (2) two of the three attempted murder counts. Thus, the consecutive sentence imposed for the attempted murder of Arlen Padilla (count 1) and the concurrent sentence imposed for the attempted murder of Padilla's sister (count 2) were not required to be stayed under section 654 as long as Maria Padilla was designated as the victim of the offense of shooting at an unoccupied motor vehicle. However, the trial court erred in imposing a further unstayed, concurrent sentence for the attempted murder of Maria Padilla (count 3) because "the trial court can impose an unstayed sentence for the shooting, based on any given victim, or for the [attempted murder of] that victim, *but not for both*." (*Garcia, supra*, 32 Cal.App.4th p. 1784, italics added.)[5]

Accordingly, we will modify the judgment to stay the concurrent sentence on count 3 and associated enhancement allegations.

C. *Custody/Conduct Credits*

Defendant maintains that the trial court incorrectly gave him credit for only 950 days spent in custody for the offenses charged in this proceeding when he in fact spent 951 days in custody. Defendant points out that he was also entitled to receive conduct credits equal to 15 percent of his actual period of confinement before sentencing pursuant to section 2933.1, subdivisions (a) and (c). The People concede, and we agree,

[5] We are not persuaded by the People's argument that the unstayed sentence on count 3 was proper because defendant entertained different criminal objectives in committing the offenses charged in counts 3 and 4. In our view, the evidence shows a single indivisible course of conduct with multiple victims for purposes of section 654.

that defendant is entitled to 951 days of presentence custody credit and 142 days of presentence conduct credit, and that the abstract of judgment should be so amended.

When the facts are undisputed, we may correct a miscalculation in presentence credits in the first instance in order to serve the interests of judicial economy. (See, e.g., *People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

III. DISPOSITION

The judgment is modified to (1) stay the concurrent sentence on count 3 and associated enhancement allegations, and (2) give defendant 951 days of presentence custody credit and 142 days of presentence conduct credit. In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment and to transmit a copy of the amended abstract to the Department of Corrections and Rehabilitation.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.